

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

QUANITA A. PEOPLES

Claimant

VS.

LANGLEY/EMPIRE CANDLE COMPANY

Respondent

AND

SECURA INSURANCE, A MUTUAL COMPANY

Insurance Carrier

Docket No. 1,045,122

ORDER

Claimant appeals the June 4, 2009, preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was denied workers compensation benefits after the ALJ found that claimant had failed to prove that she suffered an accidental injury which arose out of and in the course of her employment with respondent and that claimant had failed to provide timely notice of the alleged accident.

Claimant appeared by her attorney, Andrew C. Schendel of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, Jeffrey A. Mullins of Lenexa, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held June 3, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? Claimant contends that the lifting required by her job with respondent resulted in a hernia developing on February 17, 2009. Respondent contends that

the hernia occurred away from respondent's workplace and actually existed before claimant came to work on the alleged date of accident.

2. Did claimant provide respondent with timely notice of the alleged accident? In the alternative, did respondent have sufficient knowledge of the accident to negate the required notice? If not, was there just cause for claimant's failure to provide the required notice? Claimant's "Notice Of Appeal", filed with the Workers Compensation Division (Division), raises only the issue of timely notice. But, in her brief to the Board, both "just cause" and "actual knowledge" are discussed. The Board will consider each as a separate issue below. Respondent contends that claimant knew that her hernia was the result of her work with respondent, yet she did not provide the required notice until a full month after the alleged injury date, without justification. Respondent also denies having "actual knowledge" of an accident, alleging that it had "actual knowledge" of only of a medical condition for which claimant sought payment for her treatment through her private health insurance company.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent on March 5, 2007, as an order puller and forklift driver. Her job duties required that she load boxes of candles onto a pallet while filling a specific order. The boxes weighed between 24 and 50 pounds, and claimant would fill up to 15 pallets per shift. On February 17, 2009, while filling an order, claimant experienced what she described as a "saltlike system" in her throat,¹ and, shortly after that, she threw up. She initially attributed the problem to the fact that she had not had anything to eat. When she went to the office and got something to eat, she began to feel better. But, when she tried to return to work, she felt worse and then spent the remainder of the shift sitting and resting. Claimant experienced no pain on that date, just the sick feeling. Claimant also acknowledged that, on Monday morning, February 16, she had felt mild abdominal pain. However, she went to work on that day and performed her job duties without a problem. After claimant went home on the 17th, she noticed a boil above her belly button. On Wednesday, February 18, claimant went to Providence Medical Center's emergency room. She advised the emergency room staff that she had pain and swelling

¹ P.H. Trans. at 13.

in her abdomen which started 5 days before, which would have been Friday, February 13, 2009. However, claimant did not work on either February 13 or February 14. Claimant did assist a friend clean a building on February 15, but denies any injury on that date. The Providence Medical Center report indicates that claimant lifted boxes at work and noticed swelling in her upper abdomen. At the preliminary hearing, claimant did not testify that she noticed any abdominal swelling while at work. At the time of the examination, claimant was also listed as being pregnant.

On the Providence Medical Center Patient Registration form, the question which asked if the injury was job related was marked with an "N". Claimant was told while at Providence Medical Center that she had suffered a hernia. When the emergency room doctor pushed on the "boil", it caused severe pain. Claimant was returned to work on light duty, and performed inventory on Friday, February 20, with no lifting at work. Claimant advised her supervisor, Bill Thomas, that she had suffered a hernia, but failed to tell him that it was work related.

When claimant returned to work on Friday, February 20, performing light duty, she was given FMLA forms to fill out. She did not advise Susan Harding, respondent's accounting manager and the person who gave her the FMLA forms, that the condition was work related.

Claimant returned to Providence Medical Center on February 26 and was examined by Scott Ellison, M.D. Dr. Ellison diagnosed claimant with a ventral hernia, which he advised was possibly work related. Claimant acknowledged at the preliminary hearing that she did not tell respondent that the hernia was work related, even though she had been advised of that possibility by Dr. Ellison.

Claimant underwent a CT scan, which confirmed the hernia. She underwent a laparoscopic ventral hernia repair on March 3, 2009, under the care of Dr. Ellison.

On March 17, 2009, claimant provided a statement to Ann McDaniel, respondent's insurance adjuster. Claimant stated that her problem either began on February 18 or on February 14, 2009. Claimant also said that the pain began while she was lying down at home in bed. Claimant contacted Susan Harding on March 16, 2009, and advised that she wanted to file a workers compensation claim for the injury on February 17, 2009. Ms. Harding then filled out the Employer's Report of Accident. Ms. Harding testified that this was the first time respondent was notified that claimant was alleging a work-related injury.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁵

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁶

² K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 2008 Supp. 44-501(a).

⁵ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁶ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

Claimant alleges that she suffered a hernia while working on February 17, 2009. However, claimant suffered no onset of pain on that date while at work. Additionally, claimant admits to experiencing abdominal discomfort on Monday, February 16, before work. Claimant also advised the emergency room staff at Providence Medical Center that her condition began 5 days before her February 18, 2009, examination. Claimant also advised Ann McDaniel that her pain began while claimant was lying in bed at home. Claimant has failed to satisfy her burden of proof that she suffered an accidental injury which arose out of and in the course of her employment with respondent on the date alleged. The determination by the ALJ on this issue is affirmed.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant admits that she did not advise respondent of the alleged accidental injury until after the surgery on March 3, 2009. This is beyond the 10-day limit required by K.S.A. 44-520. Claimant argues in her brief that respondent had actual knowledge of the accident, thus rendering the notice provision unnecessary. However, claimant does not show in this record how respondent knew that she had suffered a work-related injury. Susan Harding testified that if she was aware of an obvious work-related injury, she would prepare the Employer's Report of Accident immediately, without the need for actual notice. But no such obvious injury occurred here. Claimant just began throwing up, without any signs of pain. Claimant has failed to show respondent had actual knowledge of this alleged accident.

Claimant also argues that there was just cause for her failure to provide timely notice. Several factors have been considered in determining whether just cause exists for the failure to provide notice within 10 days of a work-related injury. These include, but are

not limited to, (1) the nature of the accident, including whether it occurred as a single traumatic event or developed gradually, (2) whether claimant was aware she sustained either an accident or injury on the job, (3) the nature and history of claimant's symptoms, and (4) whether claimant was aware of the requirements of reporting a work-related accident and whether respondent had posted notice as required by K.A.R. 51-12-2.

Claimant is alleging a specific traumatic incident on February 17, 2009. The E-1, Application For Hearing, filed with the Division, does not allege a series of traumas. Likewise, claimant discusses the incident on February 17, without discussing ongoing difficulties involving any length of time at work. Claimant's symptoms appeared to come on rapidly and not over a long period. Claimant was obviously aware that she had a possible work-related injury when she visited the emergency room at Providence Medical Center and was told so by Dr. Ellison. Claimant was asked whether she had had a prior workers compensation injury while she worked at JC Penney, but no information beyond that general discussion is contained in this record. Additionally, this record does not support a finding that respondent had posted the notice required under the Kansas Workers Compensation Act.

Claimant was told early on that her problem was probably associated with her work for respondent. Yet, claimant told no one of that concern. Even when provided the FMLA papers, claimant failed to advise respondent of a possible work-related connection between her job and the hernia. This Board Member finds that claimant has failed to show just cause for her failure to notify respondent of the alleged work-related injury within 10 days. Therefore, the time to provide said notice is not extended to 75 days under K.S.A. 44-520. The denial of benefits by the ALJ in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that she suffered an accidental injury which arose out of and in the course of her employment with respondent, that she filed timely notice of the alleged accident, that respondent had actual knowledge of the alleged accident sufficient to cause the notice requirement to be unnecessary, or that there was just cause

⁷ K.S.A. 44-534a.

for her failure to provide the required notice of accident. The Order of the ALJ denying claimant benefits in this matter is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 4, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2009.

HONORABLE GARY M. KORTE

c: Andrew C. Schendel, Attorney for Claimant
Jeffrey A. Mullins, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge